Supreme Court, U. S.
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IN THE

Supreme Court of the United States

October Term, 1978

No. 79-72

NATHAN BROWN,

Petitioner,

-against-

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1978

NATHAN BROWN,

Petitioner,

-against-

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Nathan Brown, an indigent juvenile, hereby petitions for a writ of certiorari to review the judgment of the said court which affirmed a judgment of conviction of the United States District Court for the Southern District of New York.

Opinion Below

The opinion of the United States Court of Appeals for the Second Circuit rendered on May 17, 1979, is as yet unreported, but is set forth herein in the Appendix as "Exhibit A."

Jurisdiction

The judgment of the Court of Appeals was dated and entered on May 17, 1979. Jurisdiction is conferred upon this Court by 28 U.S.C. 1254(1).

The time to file this petition has been extended to July 16, 1979.

Statement

The petitioner was charged pursuant to 18 U.S.C. 5031, in a two-count juvenile information with violating 26 U.S.C. 5861(d) and 5845(a)(4), and 18 U.S.C. 2 and 2113(a).

In essence he was charged with possession of an unregistered, modified M-1 Carbine and bank robbery. The initial count, i.e., the possession of the Carbine, was severed. The Court then found that the petitioner did participate in the bank robbery, which was adjudicated to be an act of juvenile delinquency in violation of 18 U.S.C. 5031, and sentenced thereon.

The petitioner was represented at trial by Theodore Krieger, Esq., who had been appointed under the Criminal Justice Act in the District Court, and continued by the Court of Appeals.

The United States of America has been represented by Ronnie Mans, Esq. and Eugene Kaplan, Esq., Assistant United States Attorneys for the Southern District of New York.

The petitioner, fourteen (14) years of age, was on January 18, 1979 sentenced pursuant to 18 U.S.C. 5037(b) to the custody of the Attorney General until he attains his twenty-first birthday, i.e., June 5, 1985.

The petitioner remains in custody.

Statement of Facts

The petitioner proceeded to trial before the Hon. Dudley B. Bonsal, without a jury, in the United States District Court for the Southern District of New York.

The proof as adduced by the government, in support of the information, can be synthesized in the following narration.

Madeline Putlack, the head teller of the Chase Manhattan Bank branch at Lexington Avenue and 75th Street, New York City, testified that on October 26, 1978 the petitioner came to her window. He then handed her a brown paper bag and told her to "Fill it up. Move it." (T42)* Additionally, the witness identified a photograph of a short man then at the bank as the petitioner. However, she conceded that she did not give, or see anyone give, money to the petitioner (T43-44, 75).

Augusto Priest, a bank teller, testified that while at his station on October 26, 1978, a tall young man handed him a brown paper bag and told him "This is a holdup" and ordered him to put the money in the bag (T78). The witness thereupon put some twenty dollar bills in the bag and returned it to the tall man. Thereupon the tall and short young men left the bank.

Mr. Priest likewise identified the petitioner, who appeared to be armed, from a bank photograph.

John Barrett testified that he had been talking to the bank manager when he saw the petitioner at the teller's window and heard him say "move it."

Both sides thereupon rested. Summations were given and the Court rendered its decision adjudicating the petitioner to be a juvenile delinquent. A motion to set aside the adjudication of delinquency as being contrary to the weight of the evidence and to the law applicable thereto was made and denied.

The petitioner was thereupon committed pursuant to 18 U.S.C. 5037(b) to the custody of the Attorney General until he attains his twenty-first birthday.

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*The prefix "T" refers to the stenographic minutes of the trial.

Statute Involved

Title 18, United States Code, Section 5033

Custody prior to appearance before magistrate.—

Whenever a juvenile is taken into custody for an alleged act of juvenile delinquency, the arresting officer shall immediately advise such juvenile of his legal rights, in language comprehensive to a juvenile, and shall immediately notify the Attorney General and the juvenile's parents, guardian, or custodian of such custody. The arresting officer shall also notify the parents, guardian, or custodian of the rights of the juvenile and of the nature of the alleged offense.

The juvenile shall be taken before a magistrate *forthwith.* In no event shall the juvenile be detained for longer than a reasonable period of time before being brought before a magistrate. (June 25, 1948, c. 645, Sec. 1, 62 Stat. 857; Sept. 7, 1974, P.L. 93-415, Title V, Part A, Sec. 503, 88 Stat. 1135.)

REASONS FOR ALLOWING THE WRIT

POINT ONE

THE WILLFUL PROSECUTORIAL DEFIANCE OF THE ARRAIGNMENT PROVISION SET FORTH IN 18 U.S.C. 5033 WARRANTS THE EXERCISE BY THIS COURT OF ITS SUPERVISORIAL POWER OVER THE ADMINISTRATION OF JUVENILE CRIMINAL JUSTICE.

The petitioner was arrested without warrant at 8:30 A.M. on November 17, 1978, by agents of the Federal Bureau of Investigation. However he was not brought to a United States Magistrate but rather to an Assistant United States Attorney for the Southern District of New York. There again, rather than being brought to the magistrate, he was tenaciously interviewed by the aforesaid assistant. The purpose of this interview was simply to have this fourteen-year-old criminal defendant, absent parent, guardian, or counsel, inculpate himself.

The prosecutorial interview terminated at 11:30 A.M. and the appellant was arraigned at 11:55 A.M., some three and one half hours after arrest.

The delay in arraignment was the basis for a motion to suppress statements made by the petitioner. It was denied. However, in actuality none were offered at the trial and denial of the motion is without appellate significance.

Title 18, United States Code, Section 5033 provides that "a juvenile shall be taken before a magistrate forthwith." The succeeding sentence provides that "In no event shall the juvenile be detained for longer than a reasonable period of time before being brought before a magistrate."

The foregoing falls far short of being a model of legal draftsmanship. Yet is is a forthright declaration of primary intent, and was not sanction indifference to the initial mandate of a "forthwith" arraignment.

There is absolutely no justification for a prosecutorial interpretation so as to deprive a juvenile of the singular procedural safeguard set forth in the Juvenile Delinquency Act. Indeed, Section 5033 is naught save a direction to the prosecutor to immediately arraign a juvenile. It is to be done at once, without delay or equivocation. It certainly does not afford a prosecutor an excuse to defer the immediate entry of a child into the protective compassion of the juvenile justice system.

Section 5033 is the veritable antithesis of Rule 5 of the Federal Rules of Criminal Procedure, which provides that an arrested adult be brought "without unnecessary delay before the nearest available federal magistrate."

The catch all in Section 5033 that "in no event shall the juvenile be detained for longer than a reasonable period of time before being brought before a magistrate" is predicated upon some exigency which precludes obedience to the initial unequivocal command. None was ever shown to exist.

The very concept of "juvenile justice" is that one of tender years, particularly at the age of fourteen, is not to be treated as an adult. The doctrine of parents patriae cannot be fused into the rigors and stress of an adult adversarial criminal prosecution in a United States District Court.

The Court of Appeals for the Second Circuit did have occasion to consider 18 U.S.C. 5033 in *United States v. Smith*, 574 F.2d 707 (1978) in an inapposite factual pattern. There the defendant was seventeen (17) years of age at the time of the

commission of the crime, but was tried as a "street-wise" adult before a jury. He claimed the protection of the Juvenile Delinquency Act as to a delay in arraignment as well as to the suppression of all statements made by him prior to a transfer hearing which determined that he should be proceeded against as an adult.

The Court held that 18 U.S.C. 5033 eliminated the predecessor version thereof which had provided that detention was not to be for a longer period than was necessary to produce a juvenile before a committing magistrate. It stated at 710 that:

> "The present version has eliminated the word 'necessary' and substituted 'for longer than a *reasonable* period of time' (emphasis supplied). While we find nothing in the legislative history to indicate the reason for this change in the language of the statute, there is clearly no reason to believe that it imposes any more rigorous criterion than that supplied in our previous decisions."

It is submitted that if there was no reason to adopt a statutory charge, why was it done? Particularly so in the nature of a charge from a negative interdiction to an affirmative direction of "forthwith" arraignment.

The failure and refusal of the United States Attorney to comply with the statutory direction contained in 18 U.S.C. 5033 warrants the exercise by this Court of its supervisory power over the administration of juvenile criminal justice.

POINT TWO

UPON ITS EXERCISE THEREOF, THE ADJUDICATION OF THE PETITIONER AS A JUVENILE DELINQUENT SHOULD BE VACATED.

There is no express constitutional or statutory authorization for, absent counsel, deliberate post-arrest pre-arraignment prosecutorial interrogation of an accused. Indeed, the Court of Appeals for the Second Circuit has voiced concern thereon in oral argument in *United States v. Manzueta,* Docket No. 77-1499. The response of the United States Attorney, attached hereto as "Exhibit B" to this petition, is neither applicable nor justification for the intentional violation of the appellant's rights under Title 18, United States Code, Section 5033. To the contrary it is adamant in its intent to continue this practice and so long as it escapes sanction. It should be imposed irrespective of a showing of prejudice as against the petitioner.

The Court of Appeals in affirming the adjudication of juvenile delinquency held that the delay was not unreasonable, but was partly attributable to an inability to locate the petitioner's parents.

It is respectfully submitted that the United States Attorney for the Southern District of New York is capable of simultaneously attempting to locate a juvenile's parents and arraigning a juvenile. Even if it be onerous it should not be an excuse for pre-arraignment interrogation, without the presence of counsel, when an attorney was available and on call throughout the day of the arrest.

CONCLUSION

A WRIT OF CERTIORARI SHOULD BE GRANTED.

Respectfully submitted,

THEODORE KRIEGER
Attorney for Appellant
Nathan Brown
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New York, N.Y. 10038
(212) DI 9-3900

APPENDIX A—LETTER DATED APRIL 6, 1978

United States Department of Justice

UNITED STATES ATTORNEY
SOUTHERN DISTRICT OF NEW YORK
ONE ST. ANDREW'S PLAZA
NEW YORK, NEW YORK 10007

ADDRESS REPLY TO
"UNITED STATES ATTORNEY"
AND REFER TO
INITIALS AND NUMBER

RBF,Jr.:mc

April 6, 1978

Hon. Irving R. Kaufman
Chief Judge
United States Court of Appeals
Room 2402
Foley Square
New York, New York 10007

Dear Judge Kaufman:

On Tuesday, March 21, 1978, during the course of an oral argument in United States v. Manzueta, Docket No. 77-1499, Your Honor suggested that this office reconsider its policy of having Assistant United States Attorneys interview arrested defendants prior to presentment before the Magistrate.

As a result of that suggestion, the pre-presentment interview policy was discussed with each of the Deputy Chiefs, Section Chiefs and members of the executive staff of the Criminal Division. After a complete review of existing office procedures, we have concluded that there are cogent and important reasons for the continuation of the existing interview practice. We set forth below both our reasons for continuing the practice and those steps we have taken to minimize delays in the presentment procedures.

Under present procedures, arrested defendants are brought to the Courthouse Annex following processing at the offices of the arresting agency. Defendants are first fingerprinted and photographed by the Marshals and then brought to the United States Attorney's Office. The defendant is advised of his or her rights by an Assistant United States Attorney and, if he or she waives those rights, is interviewed concerning matters relevant to bail, the circumstances of his or her arrest and facts relating to the underlying offense.

EXHIBIT A

Our experience has shown that in the case of defendants who waive their rights (a substantial percentage of arrested defendants fall within this category), and are fully interviewed by an Assistant, it is very rare that the interview itself takes longer than 30 minutes. In routine cases where the defendant has made prior admissions to one of the arresting agents, the Assistant United States Attorney interview procedure is generally expedited by simply inquiring into the voluntariness and accuracy of the earlier statement and whether the defendant had been advised of his or her rights and understood his or her rights prior to making the earlier statement. In the case of non-English-speaking defendants, the interview will, of course, take somewhat longer and in the rare case of defendants who speak neither English nor Spanish there is occasionally a more substantial period of delay in obtaining the services of an interpreter.

The length of the Assistant United States Attorney's interview may also occasionally be greater in situations involving more serious crimes, such as crimes of violence and narcotics. In such cases where potential cooperating defendants may have legitimate fears for their own safety or their family's safety, we have often felt it important at this early stage of the proceedings, frequently before the person's arrest becomes known to his associates, to advise such defendants of the possibilities of witness protection and relocation under the Department of Justice's Witness Relocation Program and to answer such questions about these matters as they may have.

Following the Assistant United States Attorney's interview, the defendant is interviewed by a representative of the Pretrial Services Agency ("PSA"). During this same time period the Assistant United States Attorney drafts a complaint which is then typed in our office.

PSA thereafter attempts to verify the personal information which the defendant has given to the PSA representative. When the PSA verification procedure has been completed, the Assistant United States Attorney is notified and all parties appear in the Magistrate's office. In routine cases, during this period of PSA verification, the defendant himself or herself (escorted by an agent) is permitted to wait in the Magistrate's office. During this same period, where it appears

likely that the defendant will be eligible for the appointment of counsel under the Criminal Justice Act, a copy of the complaint will be made available to the Legal Aid or CJA attorney on duty.

To minimize any delay occasioned by the Assistant United States Attorney interview, rosters designating both a "Complaint Assistant" and a "Back-Up Complaint Assistant" are set up weeks in advance. Separate rosters have been established within the Narcotics Unit which handles its own interviews and arraignments. Moreover, in those rare situations where "round-up" type arrests are expected in significant conspiracy cases, particularly in the narcotics area, a team of Assistant United States Attorneys will be notified in advance to assure their availability for the interviews and presentments.

Finally, in certain situations such as those involving late afternoon arrests, where even a minimal delay occasioned by the Assistant United States Attorney interview may mean the difference between same-day presentment before the Magistrate or presentment the following morning, the Deputy Chiefs of the Criminal Division will, as a discretionary matter, determine that the Assistant United States Attorney interview should be foregone in the particular case.

From the standpoint of delay, therefore, we believe that any additional delay occasioned by the Assistant United States Attorney interview procedure is minimal. Whether or not the Assistant United States Attorney interview took place, the defendant would have to be processed at the agency, fingerprinted and photographed by the Marshals and interviewed by PSA; the Assistant United States Attorney would, in any event, have to be briefed on the facts of the case by the arresting agent and draft the complaint, and the presentment would, in any event, have to await the results of the PSA verification procedures. We also believe that in certain situations interview by agents during the course of standard agency processing of an arrested defendant is shortened in the knowledge that a defendant interview will also take place in our office. Finally, even the normal 30-minute maximum actual Assistant United States Attorney interview time often simply overlaps in respect to time other necessary aspects of pre-presentment procedure (e.g., return of fingerprint information from the Marshals) and in fact causes no additional delay.

We believe that the pre-presentment AUSA interview procedure serves a vital law enforcement function, particularly in the context of the increasingly stringent provisions of the Speedy Trial Act. Confessions by culpable individuals voluntarily given with a full understanding of their constitutional rights are beneficial from a societal standpoint, ease the burden of Court congestion by enhancing the likelihood of disposition rather than trial, and enable the prosecutor at an early point in the proceedings to devote the bulk of his or her attention to cases more likely to go to trial. Even in situations where the arrested defendant has already "confessed" to the agent, a trained AUSA may ask questions of significance during the defendant's interview which clarify the defendant's previous statements or further the investigation. In addition, the Assistant United States Attorney interview procedure enables any allegations of agent misconduct to be brought to the attention of the United States Attorney's Office at an early stage of the proceedings.

In a substantial number of cases where defendants confirm to an AUSA the voluntariness of prior statements made to the agent (and also confirm that they were advised and waived their Miranda rights prior to making the statement) frivolous motion practice in the District Court is minimized and unnecessary hearings are avoided. We believe that many defense attorneys, particularly Legal Aid and CJA attorneys faced with the possibility that clients will, years later, accuse them of not having taken all necessary steps on their behalf, often feel compelled to make Miranda motions. In our judgment, the likelihood of such a motion is substantially reduced where the defendant reaffirms to an AUSA (on an interview form which is subsequently turned over to the defense counsel under Rule 16, in most cases without the necessity of formal motions and frequently in advance of indictment), the voluntariness of his prior statements and the knowing nature of his prior Miranda waiver. We believe the decrease in motions and hearings in the District Court and the increase in dispositions in lieu of trial attributable to the AUSA interview procedure are significant factors in justifying the continuation of the practice.

We also believe that the procedure is of immense benefit to law enforcement to the extent that individuals agree to cooperate in significant cases and investigations.

Inducing or cementing the cooperation of insiders is particularly vital in the narcotics conspiracy cases in which our office has pioneered. It is not at all infrequent, particularly in important cases where a defendant's cooperation with the Government may hinge in the final analysis on witness protection, consideration by the prosecutor in plea-arrangements, immunity, incarceration in "safe houses", etc., that the agreement to cooperate is made by the defendant for the first time during the course of the AUSA interview. This is so because the AUSA, not the agent, is usually the person who can make the promises or undertakings necessary to such agreements.

Even in the more routine cases, we believe that the AUSA interview procedure has a positive impact on law enforcement. As a result of the Speedy Trial Act and local court rules, trial often follows closely upon indictment. There is an increasingly greater pressure on Assistants to present each case thoroughly to the Grand Jury, accumulating needed documents and having all possible relevant witnesses testify in the Grand Jury rather than relying on a more leisurely period of post-indictment trial preparation. This, no doubt, has had a positive effect on thoroughness of pre-indictment investigations; it has, however, placed increasingly greater burdens on Grand Jury personnel and on AUSAs whose caseloads have increased during the same period of time in which the Speedy Trial provisions have become more stringent. In routine cases, it is simply impossible and, from an allocation-of-resources standpoint, undesirable to present each and every case to the Grand Jury with the thoroughness and meticulousness which might be desirable in a more ideal setting. The AUSA interview procedure enables the individual Assistant at the earliest stage of the proceeding to assess the case and its individual merits, to make an adequate evaluation as to the likelihood of trial as opposed to disposition, and thereby to allocate his or her time and organize his or her Grand Jury presentation accordingly.

While law enforcement considerations are primary in our decision to continue the practice of pre-presentment AUSA interviews, that practice, we believe, also has proven over the years to have substantially enhanced the quality of justice in this District. Weak cases are and have been weeded out and mistakes corrected as a result of the AUSA interview procedure itself. Information

provided during the course of the AUSA interview has often been decisive in causing Assistants to make more reasonable bail recommendations than were suggested by the arresting agents. In addition, likely candidates for deferred prosecution often become apparent to the Assistant at the early stage of the prosecution and the deferred prosecution mechanism can be expedited.

We, of course, are mindful of Your Honor's expression of concern, and the reasons therefor, during the course of rendering the Manzueta decision from the bench and wish to assure Your Honor that the pre-presentment interview policy has received the most careful and thorough reconsideration within our office. For the reasons above stated, however, we believe that the positive benefits to law enforcement and court administration occasioned by this practice outweighs the minimal delay, if any, in time of presentment. It is, therefore, our present intention to continue the practice of pre-presentment AUSA interviews of arrested defendants with such flexibility and modifications in procedures as future experience and practice may suggest.

Very truly yours,

ROBERT B. FISKE, JR.
United States Attorney

APPENDIX B—OPINION

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

At a stated term of the United States Court of Appeals for the Second Circuit held at the United States Courthouse in the City of New York on the 17th day of May, 1979.

PRESENT:

HON. IRVING B. KAUFMAN, Chief Judge
HON. WILLIAM B. TIMBERS, Circuit Judge
HON. HOWARD T. MARKEY, United States Court of Customs and Patent Appeals, sitting by designation

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UNITED STATES OF AMERICA,
Appellee,

v.

NATHAN BROWN,
Defendant-Appellant.

No. 79-1057

On Appeal from the United States District Court for the Southern District of New York:

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District

of New York and was argued by counsel. On consideration whereof, it is now hereby Ordered, Adjudged and Decreed that the judgment of said District Court be and hereby is affirmed.

1. Given Judge Bonsal's explicit finding that the three-hour hiatus between arrest and arraignment was not unreasonable, and that part of the delay was attributable to the government's inability to locate Brown's parents, we do not think that the government can be said to have contravened 18 U.S.C. Section 5033. See, *United States v. Smith,* 574 F.2d 707 (2nd Cir. 1978).

2. In any event, this case clearly does not involve substantial government misconduct resulting in prejudice to the defendant and accordingly the extreme sanction of dismissal of the criminal information would not have been warranted. See, e.g., *United States v. Broward,* #78-1409 (2nd Cir., March 9, 1979, at 1625).

HON. IRVING B. KAUFMAN

HON. WILLIAM B. TIMBERS

HON. HOWARD T. MARKEY